

1 BRUCE V. SPIVA
(Cal. Bar No. 164032)
2 BSpiva@perkinscoie.com
ANDREW E. SHIPLEY
3 (*pro hac vice* application pending)
AShipley@perkinscoie.com
4 ANDREW J. VICTOR
(*pro hac vice* application pending)
5 AVictor@perkinscoie.com
PERKINS COIE LLP
6 700 13th Street, NW, Suite 600
Washington, DC 20005-3960
7 Telephone: 202.654.6200
Facsimile: 202.654.6211

8 ALISHA C. BURGIN
9 (Cal. Bar No. 286269)
ABurgin@perkinscoie.com
10 **PERKINS COIE LLP**
1888 Century Park E., Suite 1700
11 Los Angeles, CA 90067-1721
Telephone: 310.788.9900
12 Facsimile: 310.788.3399

13 Attorneys for Defendant
NORTHROP GRUMMAN SYSTEMS
14 CORPORATION

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17

18 KST DATA, INC.,

19 Plaintiff,

20 v.

21 NORTHROP GRUMMAN SYSTEMS
22 CORPORATION and DOES 1 through
25,

23 Defendants.
24
25
26
27
28

Case No. 2:17-cv-5125-MWF-PJW

**NORTHROP GRUMMAN
SYSTEMS CORPORATION'S
MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO
DISMISS**

(Fed. R. Civ. P. 12(b)(6))

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. OVERVIEW.....	1
III. BACKGROUND FACTS	4
IV. ARGUMENT	7
A. STANDARD OF DECISION	7
B. NORTHROP GRUMMAN DID NOT BREACH THE AWARD.....	7
1. NORTHROP GRUMMAN’S PURPORTED FAILURE TO PROVIDE FORECASTS WAS IMMATERIAL	8
2. NORTHROP GRUMMAN DID NOT BREACH ITS DUTY TO NEGOTIATE IN GOOD FAITH UNDER SECTION 4.6	10
3. NORTHROP GRUMMAN DID NOT TERMINATE THE AWARD FOR CONVENIENCE	11
C. NORTHROP GRUMMAN DID NOT BREACH ITS DUTY OF GOOD FAITH AND FAIR DEALING.....	12
1. KST SEEKS TO IMPOSE IMPLIED DUTIES THAT CONTRADICT THE AWARD’S EXPRESS TERMS	13
2. NO REASONABLE INFERENCE CAN BE DRAWN FROM THE COMPLAINT THAT NORTHROP GRUMMAN LACKED SUBJECTIVE GOOD FAITH OR THAT ITS CONDUCT WAS OBJECTIVELY UNREASONABLE	14
D. KST’S PROMISSORY ESTOPPEL CLAIM IS SUPERFLUOUS AND LACKS THE ESSENTIAL ELEMENT OF JUSTIFIABLE RELIANCE	16
V. CONCLUSION	18

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	7
<i>Block v. eBay, Inc.</i> , 747 F.3d 1135 (9th Cir. 2014).....	7, 8
<i>Brown v. Grimes</i> , 192 Cal. App. 4th 265 (Cal. Ct. App. 2011)	9
<i>Carma Developers v. Marathon Dev.</i> , 2 Cal. 4th 342 (Cal. 1992)	12, 13, 14, 15
<i>Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.</i> , 211 Cal. App. 4th 230 (Cal. Ct. App. 2012)	16
<i>Eksouzian v. Albanese</i> , No. CV 13-00728, 2015 WL 4720478 (C.D. Cal. Aug. 7, 2015)	9
<i>Enforcement Support Agency, Inc. v. Cnty. of San Diego</i> , No. D057315, 2011 WL 5416185 (Cal. Ct. App. Nov. 9, 2011)	12
<i>Healy v. Brewster</i> , 380 P.2d 817 (Ca. 1963).....	16
<i>Hini-Szlos v. Carter</i> , No. B219941, 2010 WL 3704178 (Cal. Ct. App. Sept. 23, 2010)	8, 9
<i>In re Bankamerica Sec. Litig.</i> , 636 F. Supp. 419 (C.D. Cal. 1986).....	10
<i>Inland Concrete Enterps., Inc. v. Kraft</i> , 318 F.R.D. 383 (C.D. Cal. 2016)	8
<i>Ins. Underwriters Clearing House, Inc. v. Natomas Co.</i> , 184 Cal. App. 3d 1520 (Cal. Ct. App. 1986).....	9
<i>Johnson v. Fed. Home Loan Mge. Corp.</i> , 793 F.3d 1005 (9th Cir. 2015).....	7
<i>Laks v. Coast Fed. Sav. & Loan Ass'n</i> , 60 Cal. App. 3d 885 (Cal. Ct. App. 1976).....	17, 18

TABLE OF AUTHORITIES
(continued)

	Page
<i>Minich v. Allstate Ins. Co.</i> , 193 Cal. App. 4th 477 (Cal. Ct. App. 2011)	10, 12
<i>Money Store v. Southern California Bank</i> , 98 Cal. App. 4th 722 (Cal. Ct. App. 2002).....	16, 17
<i>Navellier v. Sletten</i> , 106 Cal. App. 4th 763 (Cal. Ct. App. 2003)	9, 11
<i>Odinma v. Aurora Loan Servs.</i> , 2010 WL 2232169 (N.D. Cal. 2010).....	16
<i>Sackett v. Spindler</i> , 248 Cal. App. 2d 220 (Cal. 1967)	9
<i>Schwartz v. KPMG</i> , 476 F.3d 756 (9th Cir. 2007).....	5, 6
<i>Unical Enterps., Inc. v. Am. Ins. Co.</i> , No. CV 05-3511 CBM, 2005 WL 6133691 (C.D. Cal. Dec. 14, 2005).....	14
<i>US Ecology, Inc. v. State</i> , 129 Cal. App. 4th 887 (Cal. Ct. App. 2005)	16
STATUTES	
Cal. Civ. Code § 1636.....	7
Cal. Civ. Code § 1641.....	7
RULES	
California Rules of Court, Rule 8.1115	8
Federal Rule of Civil Procedure 12(b)(6).....	1, 7
Local Civil Rule 11-3.9	8
OTHER AUTHORITIES	
23 WILLISTON ON CONTRACTS § 63.3 (4th ed.)	8

1 **I. INTRODUCTION**

2 This is a breach of contract case brought by Plaintiff KST Data, Inc. (“KST”)
3 against Defendant Northrop Grumman Systems Corporation (“Northrop
4 Grumman”). As discussed more fully below, Northrop Grumman entered into a
5 contract with KST for the purchase of computer equipment. During the term of the
6 contract, KST was suspended from contracting with the federal government and
7 was the subject of a federal criminal investigation. At that point, as provided for by
8 the contract, Northrop Grumman paused doing business with KST pending the
9 outcome of the investigation; during the pendency of the investigation, the contract
10 expired. Misunderstanding its rights under the contract, KST filed the Complaint,
11 asserting three counts against Northrop Grumman: (1) breach of contract, (2)
12 breach of the implied duty of good faith and fair dealing, and (3) promissory
13 estoppel. In response, Northrop Grumman moves to dismiss the Complaint
14 pursuant to Federal Rule of Civil Procedure 12(b)(6) and submits this
15 Memorandum in support thereof. Simply stated, the facts pled in the Complaint,
16 construed in the light most favorable to KST, fail to state a claim upon which relief
17 can be granted under any of the counts. Accordingly, the Court should dismiss the
18 Complaint with prejudice.

19 **II. OVERVIEW**

20 At issue are the rights and obligations under Corporate Award #3263 (the
21 “Award”) entered into by Northrop Grumman and KST. Under the Award, KST
22 was granted a non-exclusive ability to sell computer equipment to “all elements of
23 Northrop Grumman.” These “elements” — business units within Northrop
24 Grumman — had the right (but not the obligation) to purchase computer equipment
25 from KST at prices set forth in an attachment to the Award. Pursuant to the Award,
26 Northrop Grumman would periodically provide KST with a forecast of its projected
27 future purchasing requirements for KST’s planning purposes.

28 During the Award term, the National Aeronautics and Space Administration

1 (“NASA”) suspended KST for serious misconduct based on evidence gathered
2 during a Department of Justice (“DOJ”) criminal investigation into KST’s small
3 business status. While KST was suspended, Northrop Grumman turned to an
4 alternate source for its computer equipment needs. KST subsequently entered into
5 an Interim Administrative Agreement (“IAA”) with NASA that allowed KST to
6 resume selling to the federal government. The government investigation, however,
7 remained open. As part of the IAA, KST acknowledged in writing that adequate
8 cause had existed for its suspension.

9 Asserting that it had been “cleared” by NASA, KST asked Northrop
10 Grumman to place orders against a previously provided forecast of equipment.
11 Northrop Grumman, however, decided to await the outcome of the government’s
12 criminal investigation before placing any additional orders. At no time did
13 Northrop Grumman ever state that it had terminated or intended to terminate the
14 Award.

15 The Award term ended before the government’s investigation concluded. In
16 the Complaint, KST alleges that Northrop Grumman’s failure to place orders
17 pending the outcome of that investigation constituted a breach of its contractual and
18 good faith duties and a termination of the Award. Specifically, KST alleges that
19 Northrop Grumman breached the Award by failing to provide new forecasts, and by
20 failing to purchase KST’s inventory pursuant to the termination for convenience
21 clause. KST alleges that Northrop Grumman breached the duty of good faith and
22 fair dealing by failing to place orders against previously provided forecasts, failing
23 to advise KST of future requirements, and/or failing to advise KST that it was
24 terminating the Contract. Finally, KST alleges that it may recover under
25 promissory estoppel because of promises made by Northrop Grumman to purchase
26 inventory held by KST.

27 As set forth more fully below, neither the law nor the facts as alleged can
28 provide KST the relief it seeks. KST’s breach of contract claim based on Northrop

1 Grumman's purported failure to provide forecasts fails in light of the factual
2 allegation that Northrop Grumman advised KST it would not place orders pending
3 the outcome of the criminal investigation. The forecasts constituted Northrop
4 Grumman's estimates of its likely needs for computer equipment, and were
5 provided as a tool for KST to use for internal planning purposes. They were neither
6 orders nor binding commitments to order. By advising KST of its decision to
7 forego placing orders until the government had concluded its investigation,
8 Northrop Grumman provided KST with the material information it needed for
9 planning purposes. To base a breach of contract claim over the lack of a formal
10 document entitled "Forecast" is to exalt form over substance. In short, no
11 reasonable inference can be drawn that Northrop Grumman's alleged failure to
12 provide a forecast constituted a material breach of contract.

13 KST's claim that Northrop Grumman terminated the Award for convenience
14 rests entirely on conclusory characterizations belied by the factual allegations
15 themselves. In particular, KST cannot and does not allege that Northrop Grumman
16 ever sent an actual written notice of termination as required by the Award. Instead,
17 KST asserts that Northrop Grumman's written decision to "await the outcome of
18 the federal investigation" constituted a notice of termination. Thus, regardless of
19 how KST styles this claim, it distills into an allegation that Northrop Grumman
20 constructively terminated the Award. As set forth more fully below, the doctrine of
21 constructive termination does not apply to this case as a matter of law.

22 KST's breach of good faith and fair dealing claim fares no better. The
23 covenant of good faith and fair dealing does not require a party to take actions
24 inconsistent with the contract's express terms. Nor does a party violate this implied
25 duty if it acted in subjective good faith, and if its conduct was objectively
26 reasonable. Under the Award, Northrop Grumman had no obligation to place
27 orders against forecasted estimates or for any minimum amount; KST's claim
28 contravenes this express contract language. In addition, given KST's explicit

1 acknowledgment that adequate cause existed for its suspension, Northrop Grumman
2 had a good faith subjective and objectively reasonable basis for awaiting the
3 outcome of the government investigation before placing further orders.

4 Lastly, the existence of the Award renders the promissory estoppel count
5 superfluous under California law, as the Award's terms and conditions address the
6 same subject matter as the alleged promises underlying this claim. In any event,
7 KST fails to allege any detrimental reliance based on Northrop Grumman's alleged
8 extra-contractual promises. To the contrary, KST alleges that it procured the
9 inventory at issue in this lawsuit based on a forecast provided by Northrop
10 Grumman in September 2015. The extra-contractual promises underlying the
11 promissory estoppel claim were allegedly made "between September 2015 and June
12 2016." The Complaint does not allege any facts demonstrating that KST relied on
13 these extra-contractual promises to procure any of the inventory at issue in this
14 case. As justifiable reliance is an essential element of any promissory estoppel
15 claim, this count must be dismissed.

16 **III. BACKGROUND FACTS**

17 Northrop Grumman and KST entered into the Award on August 1, 2010.
18 Compl. ¶ 20. Under the terms of the Award, KST was authorized to sell computer
19 equipment to "all elements of Northrop Grumman" at prices set forth in an
20 attachment to the Award. Award at 1, Recitals 1-2; §§ 2.1, 2.2, 4.1.¹ KST
21 explicitly "recognize[d] the benefit to its business of enabling all elements of
22 Northrop Grumman Corporation to purchase its products and related services in
23 accordance with and pursuant to this Award." *Id.* at 1, Recital 2. Although KST
24 had the ability to sell to the entirety of Northrop Grumman, the Award did not
25 confer exclusive seller status on KST. KST was aware, therefore, that Northrop
26 Grumman reserved the right to obtain computer equipment from other sources. To
27 that end, the Award did not obligate Northrop Grumman to order any minimum

28 ¹ The Award is attached to the Complaint as Exhibit A.

1 amount of KST's products or services. Award at § 3.1; at 1, Recital No. 3.

2 Under Section 3 of the Award, Northrop Grumman provided KST with
3 written forecasts at the conclusion of each quarter. Compl. ¶ 22. These forecasts
4 represented Northrop Grumman's estimates of its projected purchasing
5 requirements, but did not obligate Northrop Grumman to purchase in accordance
6 with these estimates. Award § 3.1. Northrop Grumman's purchase obligations
7 were effected through the issuance of purchase orders, not forecasts. *Id.* § 3.2.

8 The Award had an initial term of 36 months. Compl. ¶ 21. The parties
9 agreed to a series of extensions that ultimately extended the term until July 31,
10 2016. *Id.* Under Section 6 of the Award, Northrop Grumman had the right to
11 terminate the Award for convenience at any time upon written notice to KST. *Id.* ¶
12 24.

13 In September 2015, Northrop Grumman provided a quarterly forecast of its
14 estimated needs to KST. *Id.* ¶ 26. On September 30, 2015, NASA suspended KST
15 from federal contracting for alleged misconduct as a subcontractor on a NASA
16 program. *Id.* ¶ 31.

17 On November 20, 2015, KST entered into an Interim Administrative
18 Agreement ("IAA") in which it acknowledged that NASA had adequate cause to
19 suspend it based on allegations of "serious misconduct." *See* Exhibit A, attached
20 hereto (IAA).² The IAA explained that KST was the subject of a criminal
21 investigation by the United States Department of Justice ("DOJ"). IAA at §§ 1, 5.
22 The IAA lifted KST's suspension, but remained in force pending the outcome of
23 the DOJ's investigation. IAA at 1, § 1 ("[T]his Agreement shall remain in effect

24 ² KST did not attach the IAA to its Complaint, but the court may nonetheless
25 consider the IAA attached here without converting the Motion to Dismiss into a
26 motion for summary judgment. It is well-established that a district court, in ruling
27 on a motion to dismiss, "may consider a document the authenticity of which is not
28 contested, and upon which the plaintiff's complaint necessarily relies." *Schwartz v.*
KPMG, 476 F.3d 756, 763 (9th Cir. 2007). Here, as the Complaint states, NASA
lifted KST's suspension on November 20, 2015. Compl. ¶ 37. NASA did so
because KST entered into the IAA. IAA at § 15. Thus, KST necessarily relies on
the IAA in establishing that its suspension was lifted by NASA.

1 until the conclusion of the investigation and any legal proceedings that may ensue
2 under the matter that is the subject of the pending investigation being conducted
3 under the direction of the United States Department of Justice”).

4 After entering into the IAA, KST took the position that it had been “cleared”
5 by NASA. Compl. ¶ 37. KST requested that Northrop Grumman place orders
6 pursuant to the previously submitted forecast from September 2015. *Id.* ¶¶ 38-39.

7 By letter to KST dated June 6, 2016, Northrop Grumman explained that it
8 would not place further orders with KST until the DOJ investigation into the
9 allegations of serious misconduct had concluded. Compl. ¶ 41; Exhibit B, attached
10 hereto (6/6/2016 Letter from Northrop Grumman to KST).³ Northrop Grumman
11 further advised KST that, “given the suspension, the terms of the interim
12 administrative agreement, and the continuing federal investigation into KST’s
13 activities, Northrop made a business decision to obtain from alternate sources while
14 we await the outcome of the federal investigation.” *See* Exhibit B. KST does not
15 allege in the Complaint that Northrop Grumman stated in this letter, or elsewhere,
16 that it intended or desired to terminate the Award.

17 By letter dated July 28, 2016, Northrop Grumman again reminded KST that
18 the IAA remained in force and that the related criminal investigation had not
19 concluded. Compl. ¶ 43; Exhibit C, attached hereto (7/28/2016 Letter from
20 Northrop Grumman to KST).⁴ Northrop Grumman explicitly stated in this letter
21 that it had not terminated the Award. Three days later, on July 31, 2016, the third
22 and final option year of the Award expired. Compl. ¶ 21.

23
24
25
26 ³ Like the IAA, Northrop Grumman attaches the full letters from it to KST setting
27 forth its rationale to pause doing business with KST, excerpts of which KST
selectively quotes in its Complaint. *Schwartz*, 476 F.3d at 763 (affirming district
court’s consideration of a letter referred in, but not attached to, the complaint).

28 ⁴ Notably, Northrop Grumman’s July 28, 2016 Letter extensively discusses the
IAA.

1 **IV. ARGUMENT**

2 **A. STANDARD OF DECISION**

3 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move
4 to dismiss a complaint if the plaintiff fails to state a claim upon which relief can be
5 granted. Although courts must construe the complaint in the light most favorable to
6 the plaintiff, and determine whether the complaint alleges enough facts “to state a
7 claim to relief that is plausible on its face,” *Johnson v. Fed. Home Loan Mge.*
8 *Corp.*, 793 F.3d 1005, 1007 (9th Cir. 2015) (quoting *Bell Atlantic Corp. v.*
9 *Twombly*, 550 U.S. 544, 570 (2007)), a “pleading that offers ‘labels and
10 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not
11 do,’” *id.* at 1008 (quoting *Twombly*, 550 U.S. at 555). A plaintiff must plead
12 sufficient factual content to allow “the court to draw a reasonable inference that the
13 defendant is liable for the misconduct alleged.” *Id.* at 1007. As set forth more fully
14 below, no reasonable inference may be drawn from the allegations in the Complaint
15 that Northrop Grumman is liable to KST.

16 **B. NORTHROP GRUMMAN DID NOT BREACH THE AWARD**

17 KST asserts that Northrop Grumman breached the Award by: failing to
18 provide forecasts; failing to negotiate price changes in good faith; and failing to
19 place orders pursuant to the Award’s termination for convenience clause. In a
20 breach of contract action, “a contract must be so interpreted as to give effect to the
21 mutual intention of the parties as it existed at the time of contracting, so far as the
22 same is ascertainable and lawful.” *Block v. eBay, Inc.*, 747 F.3d 1135, 1138 (9th
23 Cir. 2014) (quoting Cal. Civ. Code § 1636).⁵ The inquiry should focus on the
24 parties’ “objective intent, as evidenced by the words of the contract.” *Id.* (quotation
25 omitted). “[T]he whole of a contract is to be taken together, so as to give effect to
26 every part, if reasonably practicable, each clause helping to interpret the other.” *Id.*
27 (quoting Cal. Civ. Code § 1641).

28 ⁵ California law applies. *See* Award § 35.

1 KST's breach of contract claim fails to reflect the intention of the parties, "as
2 evidenced by the words of the contract," *id.*, and fails to construe the Award as a
3 whole.

4 **1. NORTHROP GRUMMAN'S PURPORTED FAILURE TO**
5 **PROVIDE FORECASTS WAS IMMATERIAL**

6 KST alleges that Northrop Grumman breached the Award by failing to
7 provide forecasts of its projected orders in accordance with Section 3.1 of the
8 Award. Compl. ¶ 51(a). The forecasts were used to inform KST of Northrop
9 Grumman's estimated business needs — they were tools for KST to "utilize . . . for
10 its internal planning requirements." Award § 3.1. They were neither orders nor
11 binding commitments to order. In fact, the very same Award provision that called
12 for forecasts expressly provided that Northrop Grumman had "no obligation to
13 purchase the number of units set forth in the Forecast or place an order for any
14 minimum dollar value or quantity of Products and/or Services with Seller during
15 the term of this Award" *Id.* In short, whether Northrop Grumman forecasted
16 10,000 units or zero units had no bearing on Northrop Grumman's purchase
17 obligations.

18 In the Complaint, KST excises the "no obligation to order" language from
19 the Award's "Forecast" section. By failing to read the provision as a whole,
20 however, KST imbues the forecasts with a materiality the parties never intended
21 and that no reasonable inference drawn from the alleged facts can support.

22 To recover on its claim, KST must show that the alleged breach was material.
23 *See Hini-Szlos v. Carter*, No. B219941, 2010 WL 3704178 (Cal. Ct. App. Sept. 23,
24 2010) (citing 23 WILLISTON ON CONTRACTS § 63.3 (4th ed.)).⁶ A breach is material

25 ⁶ Although this case is an unpublished California state court decision, this Court has
26 recognized that, while California Rules of Court, Rule 8.1115 prohibits citations to
27 unpublished decisions, a federal court exercising diversity jurisdiction is not bound
28 by a state's procedural rules." *Inland Concrete Enterps., Inc. v. Kraft*, 318 F.R.D.
383, 405-406 (C.D. Cal. 2016) (brackets and quotation marks omitted). Further, this
Court's Local Civil Rule 11-3.9, addressing "Citations," does not "purport to
restrict the right of judges or parties to cite unpublished decisions." *Id.* at 406.
Thus, this Court has considered unpublished California state court decisions. *Id.*

1 if it goes to the essence of a contract. *Id.* Whether a breach is material depends on
2 various factors, including the importance or seriousness of the breach and whether
3 the injured party could be compensated by damages from the breach. *Eksouzian v.*
4 *Albanese*, No. CV 13-00728, 2015 WL 4720478, at *9 (C.D. Cal. Aug. 7, 2015)
5 (citing *Brown v. Grimes*, 192 Cal. App. 4th 265, 277 (Cal. Ct. App. 2011) and
6 *Sackett v. Spindler*, 248 Cal. App. 2d 220, 229 (Cal. 1967)). California courts
7 consider materiality of breach to be a mixed question of law and fact, but “if
8 reasonable minds cannot differ on the issue of materiality, the issue may be
9 resolved as a matter of law.” *Ins. Underwriters Clearing House, Inc. v. Natomas*
10 *Co.*, 184 Cal. App. 3d 1520, 1527 (Cal. Ct. App. 1986).

11 Reasonable minds cannot differ as to whether Northrop Grumman’s alleged
12 failure to provide forecasts constituted a material breach of the Award. As noted
13 above, the forecasts were intended to give KST information concerning Northrop
14 Grumman’s future projected purchasing requirements. The Complaint makes clear
15 that KST had that information: zero purchases until the government investigation
16 concluded. *See* Compl. ¶¶ 41, 43. To insist that Northrop Grumman breached the
17 Award because KST did not receive this information in a formal document entitled
18 “Forecasts” is to exalt form over substance, ignore the intent of the parties, and read
19 the contract in piecemeal fashion rather than as a whole.

20 The Complaint’s failure to identify any damages that flow from this alleged
21 breach underscores its immaterial nature, and is also fatal to the claim. The
22 damages KST seeks arise from Northrop Grumman’s alleged failure to purchase
23 inventory, not because of any impact to KST’s ability to plan around estimates of
24 Northrop Grumman’s future needs. As damages are an essential element of any
25 breach of contract claim, this claim must be dismissed. *Navellier v. Sletten*, 106
26 Cal. App. 4th 763, 775 (Cal. Ct. App. 2003).

27
28 Accordingly, Northrop Grumman cites cases, published and unpublished, that bear
directly on the issues raised in the Complaint.

1 **2. NORTHROP GRUMMAN DID NOT BREACH ITS DUTY**
2 **TO NEGOTIATE IN GOOD FAITH UNDER SECTION 4.6**

3 KST alleges that Northrop Grumman breached Section 4.6 of the Award.
4 Compl. ¶ 51(b). Construing the allegations in the Complaint in the light most
5 favorable to KST, this claim must be dismissed because, under the plain terms of
6 the Award, Section 4.6 did not apply.

7 Section 4.6 of the Award required the parties to engage in good faith
8 negotiations regarding price and/discount rates “suggested by” KST in the event
9 Northrop Grumman expected decreases in purchase volume resulting from “the
10 removal or divestiture of any operating elements, program adjustment, or decreased
11 business activity . . . or otherwise” Award at § 4.6. Read in the context of the
12 Award as a whole, Section 4.6 was intended to address the anticipated impact on
13 future purchase volumes arising from structural and operational changes to
14 Northrop Grumman’s business. It was not intended to address the consequences of
15 KST’s “serious misconduct.” In any event, the Complaint fails to allege that KST
16 suggested any price or discount rates. On this basis alone, KST’s claim for breach
17 of Section 4.6 should be dismissed.

18 In addition, as the Complaint alleges, Northrop Grumman advised KST that
19 it would not place further orders until DOJ’s investigation had concluded. Compl.
20 ¶ 41. There would be no point in negotiating “suggested” pricing on a purchase
21 order for zero product, and no reasonable inference can be drawn that the parties
22 intended Section 4.6 to require any such negotiations. *Minich v. Allstate Ins. Co.*,
23 193 Cal. App. 4th 477, 485 (Cal. Ct. App. 2011). Nor does the law require parties
24 to engage in pointless conduct. *See In re Bankamerica Sec. Litig.*, 636 F. Supp.
25 419, 422 (C.D. Cal. 1986) (recognizing that “the law abhors useless acts”).

26 Lastly, even assuming that Northrop Grumman breached its obligation to
27 negotiate revised pricing, the facts as pled do not give rise to damages. Section 4.6
28 expressly states that Northrop Grumman had no obligation to agree to any pricing

1 changes suggested by KST. Without such an obligation, KST cannot establish that
2 it suffered any harm. Absent an ability to allege damages, the breach claim must
3 fail. *Navellier*, 106 Cal. App. 4th at 775.

4 **3. NORTHROP GRUMMAN DID NOT TERMINATE THE**
5 **AWARD FOR CONVENIENCE**

6 KST alleges that Northrop Grumman breached the Award by failing to pay
7 KST amounts owed under the termination for convenience clause. Compl. ¶¶ 51
8 (c)-(e). KST's claim assumes away a critical threshold fact, namely, that Northrop
9 Grumman terminated the Award, by asserting in conclusory fashion that Northrop
10 Grumman's decision to hold off placing orders equated to termination. Compl. ¶
11 51(e). It did not. The Award was a non-exclusive vehicle through which Northrop
12 Grumman *could* order equipment. The Award did not obligate Northrop Grumman
13 to place orders against the forecast, or in any minimum quantities, or from KST at
14 all. Put simply, Northrop Grumman could decline to place orders without
15 terminating the Award.

16 Importantly, the facts as alleged provide no basis for inferring that Northrop
17 Grumman ever terminated the Award. Section 6.4 of the Award explicitly states
18 that a termination for convenience could be effected only in writing. The
19 Complaint does not allege that Northrop Grumman ever stated in writing that it had
20 or intended to terminate the Award. Instead, the Complaint alleges that Northrop
21 Grumman's statement in a letter dated June 6, 2016 that it had made a "business
22 decision to order from alternate sources while [it] await[ed] the outcome of the
23 federal investigation" "constituted termination" of the Award. *Id.* ¶¶ 41-42. This
24 conclusory assertion falls short of the factual pleading necessary to allege an actual
25 termination. Indeed, in the June 6, 2016 letter relied upon by KST, Northrop
26 Grumman explicitly disclaimed that it had terminated the Award. Exhibit B at 2
27 ("KST's assertions that Northrop has terminated the [Award] for convenience are
28 misplaced. The [Award] itself or a purchase order issued under the [Award] may

1 be terminated by Northrop only by written notice to KST, which has not been
2 provided.”). The Complaint further references a July 28, 2016 letter from Northrop
3 Grumman. Compl. ¶ 43. In that letter, Northrop Grumman made the same
4 disclaimer. Exhibit C at 2.

5 Apparently recognizing that it failed to allege the facts necessary to support a
6 claim based upon a “written notice of termination,” KST argues in the alternative
7 that Northrop Grumman “constructively” terminated the Award. Compl. ¶ 51(e).
8 Cases interpreting “termination for convenience” clauses make clear that such
9 provisions are enforced according to their terms. *See Enforcement Support Agency,*
10 *Inc. v. Cnty. of San Diego*, No. D057315, 2011 WL 5416185, at *3-4 (Cal. Ct. App.
11 Nov. 9, 2011) (court enforced termination for convenience clause despite
12 terminating party’s failure to engage in contract’s mandatory dispute escalation
13 procedures because the two provisions were independent of each other). KST’s
14 claim of constructive termination contradicts Section 6.4’s requirement that a
15 termination for convenience be accomplished by writing. As California law
16 requires contracts to be interpreted according to their terms, KST’s “constructive
17 termination” claim must fail. *Minich*, 193 Cal. App. 4th at 485.

18 **C. NORTHROP GRUMMAN DID NOT BREACH ITS DUTY OF**
19 **GOOD FAITH AND FAIR DEALING**

20 In its second cause of action, KST asserts that Northrop Grumman breached
21 the covenant of good faith and fair dealing. Compl. ¶¶ 53-57. In support of this
22 claim, KST alleges that Northrop Grumman breached its duty by failing to place
23 orders after September 30, 2015 (*i.e.*, after KST was suspended by NASA), failing
24 to advise KST of future projected requirements, and/or failing to advise KST that
25 Northrop Grumman was terminating the Award for convenience. *Id.* ¶ 55. KST’s
26 claim fails because it seeks to impose obligations on Northrop Grumman that are
27 inconsistent with the express terms of the Award. *Carma Developers v. Marathon*
28 *Dev.*, 2 Cal. 4th 342, 373 (Cal. 1992) (holding that the express terms of a contract

1 limit the scope of conduct prohibited by the covenant of good faith and fair
2 dealing). In addition, the facts alleged in the Complaint cannot support a
3 reasonable inference that Northrop Grumman lacked subjective good faith or that
4 its conduct was objectively unreasonable. Accordingly, KST's second cause of
5 action must be dismissed.

6 **1. KST SEEKS TO IMPOSE IMPLIED DUTIES THAT**
7 **CONTRADICT THE AWARD'S EXPRESS TERMS**

8 The implied duty of good faith and fair dealing prohibits a party from
9 engaging in conduct that runs counter to the expectations of the parties or
10 undermines the purpose of their contract. Importantly, however, the "scope of
11 conduct prohibited by the covenant of good faith *is circumscribed by the purposes*
12 *and express terms of the contract.*" *Carma Developers*, 2 Cal. 4th at 373 (emphasis
13 added). In short, the duty does not operate to change unambiguous contract terms.
14 In *Carma Developers*, for example, the court rejected plaintiff's claim that a
15 developer breached the duty of good faith and fair dealing by terminating a lease
16 because the contract expressly permitted such action. The court noted that it was
17 unaware of any reported case holding that "the covenant of good faith may be read
18 to prohibit a party from doing that which is expressly permitted by an agreement."
19 *Id.* at 374.

20 KST's claim seeks to change the Award's unambiguous terms. In particular,
21 KST asserts that Northrop Grumman had an implied duty to place orders "after
22 September 15, 2015" Compl. ¶ 55(a). As discussed above, however, the
23 Award explicitly stated that Northrop Grumman had no obligation to place orders
24 against forecasts, or even to place a minimum order for any quantity or dollar
25 amount. Because this aspect of KST's claim directly contravenes the Award's
26 unambiguous terms, it must be dismissed.

27 KST also claims that Northrop Grumman had an implied duty to provide
28 "projected future requirements." Compl. ¶55(b). This claim is virtually identical to

1 the breach of contract claim premised on the alleged failure to issue forecasts, and
2 must be dismissed for the same reasons: Northrop Grumman provided its projected
3 future requirements to KST (no orders until the federal criminal investigation
4 concluded). In any event, KST has not alleged any damages flowing from this
5 alleged breach.

6 Finally, KST claims that Northrop Grumman failed to advise KST that it was
7 terminating the Award for convenience. This claim is wrong, superfluous, and
8 nonsensical. The Award's unambiguous terms provided that a termination for
9 convenience had to be effected in writing. The Award could not be terminated
10 surreptitiously. Accordingly, the Award was either terminated for convenience, or it
11 was not. If it was terminated (as previously discussed, it was not), KST must turn
12 to the Award's termination provision for its remedy. By seeking a different
13 outcome, KST's claim contravenes the terms of the Award. If the Award was not
14 terminated, then Northrop Grumman had no duty to advise of something that did
15 not occur.

16 **2. NO REASONABLE INFERENCE CAN BE DRAWN**
17 **FROM THE COMPLAINT THAT NORTHROP**
18 **GRUMMAN LACKED SUBJECTIVE GOOD FAITH OR**
THAT ITS CONDUCT WAS OBJECTIVELY
UNREASONABLE

19 A party violates the duty of good faith and fair dealing if (1) it subjectively
20 lacks belief in the validity of its act, or (2) if its conduct is objectively unreasonable.
21 *Carma Developers*, 2 Cal. 4th at 372; *Unical Enterps., Inc. v. Am. Ins. Co.*, No. CV
22 05-3511 CBM, 2005 WL 6133691, at *4 (C.D. Cal. Dec. 14, 2005). No reasonable
23 inference can be drawn from the facts alleged in the Complaint that Northrop
24 Grumman lacked a good faith belief in the validity of its conduct or that its conduct
25 was objectively unreasonable. First, as the Complaint states, NASA suspended
26 KST on September 30, 2015. Compl. ¶ 31. Following the suspension, KST and
27 NASA entered into the IAA. The IAA stated that NASA had adequate evidence to
28 suspend KST based on allegations of "serious misconduct." KST acknowledged in

1 the IAA that adequate cause existed for its suspension, that it still was under
2 criminal investigation by DOJ, and that the IAA would remain in place until the
3 conclusion of that investigation. IAA at 1(D); §§ 1, 5.

4 As the Complaint makes clear, Northrop Grumman told KST that it had
5 “made a business decision to order from alternate sources” while Northrop
6 Grumman awaited “the outcome of the federal investigation.” Compl. ¶ 41. In the
7 July 28, 2016 letter, an excerpt of which KST quotes in paragraph 43 of the
8 Complaint, Northrop Grumman also explained that it “was hopeful that KST could
9 address and resolve the serious questions being raised by DOJ’s criminal
10 investigation notwithstanding the *Interim Administrative Agreement* notably stating
11 that KST would no longer be eligible to work directly or indirectly on NASA’s
12 ACES contract other than to closeout its subcontract. If the investigations cleared
13 KST of wrongdoing during the term of the contract, Northrop Grumman could have
14 resumed purchases.” Exhibit C at 2 (*italics in original*). In sum, the facts alleged
15 demonstrate that Northrop Grumman had a good faith basis for its actions. Under
16 these circumstances, KST’s claim for breach of the implied duty of good faith and
17 fair dealing must fail. *Carma*, 2 Cal. 4th at 372.

18 The allegations in the Complaint also make clear that Northrop Grumman’s
19 conduct was objectively reasonable. KST did not have exclusive rights to sell to
20 Northrop Grumman; nor did Northrop Grumman have an obligation to place orders
21 under the Award. Given the allegations of “serious misconduct,” KST’s
22 acknowledgement that adequate cause existed for the suspension, and the ongoing
23 criminal investigation, Northrop Grumman could not be certain as to KST’s
24 continued eligibility for federal contracting.⁷ But Northrop Grumman continued to
25 have business needs that required it to purchase computer equipment. Northrop

26 ⁷ KST’s allegations that the Award and the Federal Acquisition Regulation did not
27 prevent Northrop Grumman from continuing to purchase from KST during the
28 pendency of its suspension, Compl. ¶¶ 32, 33, are irrelevant, and cannot support an
inference that Northrop Grumman acted *unreasonably* by not issuing purchase
orders to a subcontractor under criminal investigation by the federal government.

1 Grumman's decision to secure alternate sources while keeping the KST contract
2 open in the event the criminal investigation into KST was favorably resolved was
3 eminently reasonable. *See* Exhibit C at 2.

4 Accordingly, KST's claim for the breach of the covenant of good faith and
5 fair dealing should be dismissed.

6 **D. KST'S PROMISSORY ESTOPPEL CLAIM IS SUPERFLUOUS**
7 **AND LACKS THE ESSENTIAL ELEMENT OF JUSTIFIABLE**
8 **RELIANCE**

9 The Complaint's third cause of action alleges promissory estoppel. Compl.
10 ¶¶ 58-61. Specifically, KST alleges that, at various times between September 2015
11 and June 2016, Northrop Grumman promised to issue purchase orders to KST, and
12 that KST relied upon these promises to procure equipment. *Id.* ¶¶ 59-60. Like the
other claims, this claim fails as a matter of law and should be dismissed.

13 Under California law, a "reliance" or a promissory estoppel claim has four
14 elements: (1) a promise clear and unambiguous in its terms; (2) reliance by the
15 party to whom the promise is made; (3) the reliance must be both reasonable and
16 foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.
17 *US Ecology, Inc. v. State*, 129 Cal. App. 4th 887, 901 (Cal. Ct. App. 2005).
18 California law, however, does not permit recovery under promissory estoppel if
19 there is a contract. *Healy v. Brewster*, 380 P.2d 817, 822 (Ca. 1963); *Odinma v.*
20 *Aurora Loan Servs.*, 2010 WL 2232169, at *10 (N.D. Cal. 2010) ("[T]he existence
21 of a contract bars application of promissory estoppel."). Indeed, a reliance claim
22 and a breach of contract claim are distinct and mutually exclusive. *Douglas E.*
23 *Barnhart, Inc. v. CMC Fabricators, Inc.*, 211 Cal. App. 4th 230, 243 (Cal. Ct. App.
24 2012) ("promissory estoppel is distinct from contract in that the promisee's
25 justifiable and detrimental reliance on the promise is regarded as a substitute for the
26 consideration required as an element of an enforceable contract"). In *Money Store*
27 *v. Southern California Bank*, 98 Cal. App. 4th 722, 731 (Cal. Ct. App. 2002), the
28 court explained that where the parties have entered into a contract, a promissory

1 estoppel claim is “superfluous.”

2 KST alleges the existence of a contract between KST and Northrop
3 Grumman, namely, the Award. Therefore, in the words of the California Court of
4 Appeal, KST’s promissory estoppel claim is “superfluous” and must be dismissed.
5 *See id.*

6 Even if KST could assert a reliance claim, no reasonable inference could be
7 drawn from the facts as alleged that the reliance was justified, or that any damages
8 flowed from it. *Laks v. Coast Fed. Sav. & Loan Ass’n*, 60 Cal. App. 3d 885, 893
9 (Cal. Ct. App. 1976). KST vaguely alleges that Northrop Grumman made promises
10 between September 2015 and June 2016 to place purchase orders. *Id.* ¶ 59. The
11 Complaint does not identify who made these promises, when they were made, or
12 what quantities they involved. KST alleges in conclusory fashion that it procured
13 equipment based on these alleged promises, but fails to allege any facts concerning
14 those procurements. *Id.* ¶ 60. KST seeks damages of \$5,000,000 based on these
15 alleged promises and the alleged resultant procurements. *Id.* ¶ 61.

16 This is the same amount KST seeks to recover for the inventory equipment it
17 allegedly procured based on forecasts Northrop Grumman provided under the
18 Award. *Compare* Compl. ¶ 27 (“The inventory of equipment that KST ordered
19 from HP in response to Northrop’s forecasts from September 2015 and earlier was
20 ordered pursuant to a pricing arrangement that Northrop had with HP”) *with*
21 Compl. ¶¶ 59-60 (“At various times between September 2015 and June 2016,
22 Northrop . . . promised to issue purchase orders to KST . . . [i]n reasonable reliance
23 on Defendant’s promises, KST procured equipment from HP”).

24 KST does not allege that there are two separate pools of inventory worth
25 \$5,000,000.00 each at issue in this case. Thus, KST either procured the inventory
26 equipment at issue based on forecasts from September 2015 and earlier, or it
27 procured the equipment based on promises made from September 2015 and after.
28 KST cannot have it both ways. Either way, the promissory estoppel claim fails. If

1 KST procured the equipment based on forecasts, then it did not rely on the alleged
2 post-September 2015 promises. If KST procured the equipment based on the post-
3 September 2015 promises, then its reliance was unjustified, as KST was well aware
4 (and the Complaint clearly alleges) that Northrop Grumman had consistently and
5 clearly advised that no orders would be made until the criminal investigation
6 concluded. *Laks*, 60 Cal. App. 3d at 893.

7 **V. CONCLUSION**

8 For the foregoing reasons, Plaintiff's Complaint should be dismissed in its
9 entirety, with prejudice.

10 DATED: July 19, 2017

PERKINS COIE LLP

11
12 By: /s/ Bruce V. Spiva

Bruce V. Spiva, Bar No. 164032
BSpiva@perkinscoie.com

13
14 Attorneys for Defendant
15 NORTHROP GRUMMAN SYSTEMS
16 CORPORATION
17
18
19
20
21
22
23
24
25
26
27
28